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ROBINSON-PATMAN ACT ASPECTS OF DUAL DISTRIBUTION BY BRAND OF CONSUMER GOODS

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Although it has been said that "the general objective of the antitrust laws is promotion of competition in open markets,"[1] it is generally recognized that in a large percentage of markets this competition takes the form of nonprice competition among sellers possessing some monopoly power.[2] As has been specifically recognized by the Supreme Court of the United States, in the sale of non-standardized products each producer has some power to set the price of his own product.[3] The model of pure competition in which this power is absent does not characterize business conduct except in a few industries. There has never been an attempt to remove completely all monopoly elements from the economy. Indeed, even if this were feasible few people would agree that it is desirable to do so.

We will discuss one monopoly element in the economy, the use of the trademark on consumer goods. The inquiry will be very narrow. It will be concerned with the distribution of identical or substantially identical products of one producer under more than one trademark.

Originally the trademark was used to identify the source of the product to which it related; it was a sort of signature of the manufacturer of the product. The law protected the seller from forgeries of his "signature" by allowing him to prevent any other seller of a similar product from using the same or a confusingly similar mark. Thus, the trademark protected the buyer and the seller from those who would pass off bogus goods as genuine.

The law's protection of trademarks was justifiable on the basis of facilitating free choice by the buyer. This protection allowed a more perfect working of a free enterprise system, under which, according to classical theory, production of goods and allocation of resources is

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1 U.S. Att'y Gen., Report of the Attorney General's National Committee to Study the Antitrust Laws 1 (1955).

2 By this is meant the power to set the price of a product by controlling the amount of the product supplied to the market. There are virtually no instances of absolute monopoly power since substitutes exist for nearly all products. The extent of monopoly power of the sole supplier of any product will depend upon the extent to which buyers will turn to substitutes when the relative prices of the monopolized product and its substitutes are changed. See Chamberlin, The Theory of Monopolistic Competition 65 (7th ed. 1956).

3 United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 392-93 (1956).

determined by the force of a multitude of choices made by a multitude of buyers.

The modern trademark, however, often serves a function quite different from that which justified it originally. For example, take a buyer considering the purchase of Brand X gasoline. The trademark does not tell him who manufactured the product. A seller may market his goods under a protected trademark whether or not he had anything to do with the production of the product bearing the mark.[4] The buyer cannot even be sure that the Brand X gasoline he is buying today is chemically the same product as the Brand X gasoline he bought yesterday, or even that it was produced by the same producer. The owner of the Brand X trademark may have produced the gasoline himself, yet over a period of time the physical make-up of the product may have changed many times. If the owner of the Brand X trademark is not the producer of the gasoline, he may be supplied by a single manufacturer or he might be purchasing from several producers at the same time.[5] Thus a modern trademark does not necessarily identify either the producer of the product or the product itself. Often the trademark is no more than a vague assurance to the buyer that he is buying a product which will provide a certain level of quality or satisfaction.[6]

This quality of the product may or may not be subject to objective determination by the buyer. Frequently the quality or satisfaction that the buyer purchases is inherent in the trademark itself rather than the product. For example, Brand X and Brand Y gasolines may be identical products manufactured by the same producer, yet as a result of favorable advertising of Brand X a buyer faced with the choice between the two brands may buy Brand X because he believes it is better. This choice may be repeated by so many buyers that Brand Y can be sold in substantial quantities in the retail market only if it is offered at a lower price which reflects its inferiority.

In modern merchandising, the trademark no longer merely facilitates free choice by the buyer. The trademark has become a value in itself over and above the value inherent in the product with which it is associated. In a real sense when a buyer buys Brand X gasoline he pays for two things—the physical product, which may or may not be the same as other gasolines being sold, and the intangible assurance associated with the name Brand X. The value of the intangible may be little or

4 3 Callmann, Unfair Competition and Trade-Marks § 68.2 (2d ed. 1950).

5 See Bain, The Economics of the Pacific Coast Petroleum Industry: Part I at 119-25 (1944).

6 3 Callman, supra note 4, § 65.

nothing, or it may be a considerable amount.[7] Frequently the market price of the intangible is in direct proportion to the efficacy of the advertising of the trademark.

The highly advertised trademark thus serves the function of allowing the owner to receive more for his product than he would receive but for the trademark. It differentiates the product in the mind of the consumer so that less favorably advertised substitutes are competitive only at a sacrifice in price. This acts as a deterrent to effective competition from producers of such substitute products. The deterrence is felt most significantly in the struggle for retail outlets.

Much of antitrust litigation is concerned with attempts by manufacturers of consumer goods to control the distribution channels through which such goods are sold. Effective competition on the manufacturing level depends in large measure on the ability of producers to obtain distribution of their products. Vertical integration forward by manufacturers into the business of distribution can therefore raise serious threats to competition, whether such integration takes the form of actual ownership of the distribution system or control over the system by contractual arrangements between manufacturer and distributor.

For the most part producers of consumer products have not found it advantageous to engage in retailing. Manufacturers who are not able or who are not willing to own their retailing establishments may try to get the benefits of vertical integration by contractual or informal arrangements with the retailer. Among franchised dealers in such industries as automobiles, farm equipment, and petroleum are familiar examples of de facto vertical integration. The retailer is a part of the manufacturer's sales organization. Although the dealer formally may be an independent businessman, his economic life is tied almost completely to the product of one supplier. Sometimes the integration between manufacturer and retailer is not so complete. The retailer may sell the goods of a number of manufacturers but not the goods of competing manufacturers. In either case, with respect to any one type of product, one retailer is paired with one supplier. Where such a pattern exists,

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7 If the product is relatively inexpensive and frequently purchased and if its quality can be readily judged by the average consumer, the trademark should have less significance than if the product is relatively expensive, not frequently purchased and not subject to easy appraisal by the consumer. Consumers are more likely to take a chance on a new brand and trust their own judgment in the former than in the latter case. But even in cases of inexpensive, simple products, relentless massive advertising can put less intensively advertised products at very serious competitive disadvantages. Ready examples are laundry detergents and cigarettes.

It has been reported that "nearly one billion Proctor & Gamble messages are delivered to the housewives of America each week." Klaw, "The Soap Wars: A Strategic Analysis," Fortune, June 1963, p. 123, 184. Private-brand laundry detergents which have been found by independent testing organizations to perform about as well as highly advertised brands are generally available in most supermarkets. But 9 out of 10 buyers prefer the nationally advertised brand even though costing as much as 40% to 45% more. Ibid.

competition on the manufacturing level may be seriously impaired by an inability to obtain adequate retail outlets. Exclusive dealing arrangements of this kind have frequently been struck down under Section 3 of the Clayton Act.[8]

Preselling of consumer goods by national advertising has a tendency to produce similar results. The producer who engages in heavy national advertising assures himself of ready access to retailers who can resell the product with a minimum of effort. Most retailers can stock a very limited number of brands of any one product. They can be expected to choose those brands for which there is a ready-made market.[9] Where brand names play a large part in consumer choices, products of producers who are unwilling, or who are unable to make the large expenditures needed for national advertising, will be handled by retailers only if the price of the product to consumers is low in comparison to comparable competing products, or if responsibility for the promotion of the product is turned over to the retailer. Retailers can be expected to assume this promotional responsibility only if the retail mark-up is disproportionately high.

Thus the nationally advertised trademark can present a substantial barrier to entering the producer market with respect to consumer products.[10] The risks inherent in launching a new consumer product by intensive national advertising apparently are very great.[11] Small business units normally will not have sufficient funds to undertake this kind of campaign. Although in theory, risk capital should be forthcoming if the prospective gains are sufficiently high, the realities of the money market make it difficult to obtain capital for this kind of venture.[12]

It is apparent that trademarks serve a dual purpose in the economy. They promote competition by protecting the owner of the trademark from competitors who would falsely trade on his good reputation. On the other hand, they sometimes impede competition by making it difficult for would-be-rivals to reach consumer markets.

It is common for producers of consumer goods to market identical or substantially similar products under different trademarks.[13] There are two situations which are typical. In one the producer sells under a highly

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8 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958).

9 Chamberlin, supra note 2, at 121.

10 For a detailed study of product differentiation as a barrier to entry see Bain, Barriers to New Competition 114-43 (1956).

11 For an interesting account of Lever Brothers' costly and unsuccessful attempts to market the laundry detergents "Surf" and "Rinso Blue," see Klaw, supra note 7.

12 Bain, Industrial Organization 251-52 (1959).

13 Several proceedings under the Robinson-Patman Act have involved this practice. E.g., Borden Co. v. FTC, 339 F.2d 133 (5th Cir. 1964); Thermoid Co., 55 F.T.C. 518 (1958); Sylvania Elec. Prods. Inc., 51 F.T.C. 282 (1954); United States Rubber Co., 46 F.T.C. 998 (1950).

advertised trademark and under an unadvertised trademark, both trademarks being producer-owned. In the second situation the product is sold under the producer's trademark as well as under the trademarks of distributors who buy from the producer.

This dual distribution of trademarked goods arises because of various competitive pressures. We will examine these competitive forces and some of the legal problems raised.

Sale of Similar Goods Under Multiple Trademarks as Discriminatory Device of Seller

As is frequently the case, the producer of a product which has been favorably differentiated by advertising may be subject to competition from a small number of producers of similar or substitute products which also have been differentiated by advertising. Unlike the seller in a purely competitive market, he has a choice of methods of competing. If he wants to increase sales, one possibility is a general reduction in price. This may be rejected whether or not the price cut is effective in diverting sales from competitors. If the market for the product is one in which brand loyalty is very strong the price cut may not be large enough to cause sufficient buyers to switch brands to pay for the per unit loss of revenue. Or, if the producer's product image is that of a premium product a substantial price cut may cheapen it in the minds of some consumers and drive away more buyers than it attracts. On the other hand, if the drop in price draws a substantial amount of business away from rivals the price cut is likely to be met. If this happens nothing has been gained and everyone is selling at a lower price. For this reason price competition of this kind is not often found in such competitive situations.

Another alternative is to compete on the basis of offering a better product. This can be done in two ways. The producer can change the physical make-up of his product to improve its quality or utility and use this as a basis for an appeal to the consumer. On the other hand, he may merely attempt to upgrade the product image by advertising. He can, of course, do both. Although he can expect retaliation from his rivals if his actions are successful in cutting into their sales, he may nevertheless choose this road. To the extent that the producer's product or his advertising appeal is different from that of his rivals he may take the chance that he can convince the consuming public that his product is better. Unlike the case of a general price cut, a competitive move of this kind cannot be certainly neutralized by the simple expedient of matching. This is the kind of competition among national sellers of consumer products with which we are most familiar. But it has its limitations. With many products physical changes cannot be made in any significant degree, and, where such is the case, advertising soon can reach a point of sharply diminishing returns. Thus, in a market of few sellers relying on product differentiation by heavy advertising, a stalemate can result.

A manufacturer who cannot effectively better his competitive position by means of general price competition or by means of further differentiation of his product may turn to selective price discrimination. As we have seen, in a market of few sellers, a general price reduction is likely to be met by competing sellers. This is not necessarily true of selective price cuts. If a manufacturer is selling to many retailers he may choose those who are best able to materially increase sales of his product. This normally would be those retailers who sell on a very large scale. He may give them a reduced price with the hope that this will cause them to push sales of his products at the expense of his rivals, either to get greater profit margins or increased sales made possible by the ability to sell at a lower resale price. The manufacturer may also make an outright payment to selected retailers for special promotion of his product. If this is done secretly or sporadically there is less likelihood of retaliation by rivals. Even if there is retaliation, it is likely to be of the same kind, *i.e.*, it will be selective or sporadic. In a battle of this kind a skillful contestant has a reasonable chance of improving his position; therefore he might be willing to fight on this basis.

Although this kind of price discrimination may be beneficial in that it allows some price competition among sellers who otherwise would not compete in price, it raises serious policy problems. The beneficiary of the discrimination is likely to be the mass distributor. The smaller retailer who competes with the mass distributor cannot perform this kind of service for the manufacturer so he is not likely to receive concessions. This, of course, would put him at a competitive disadvantage. In addition the smaller retailer is often a less efficient merchandiser. A combination of these two could make his economic life very precarious.

This policy clash between a desire to encourage as much price competition as possible among suppliers and a desire to protect the small distributor who may be an incidental victim of this type of price competition has been resolved by the Robinson-Patman Act[14] in favor of preventing price discrimination.

It seems fairly clear that the framers of the Robinson-Patman Act

14 Section 2(a) of the act provides, in part:

> [I]t shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them . . . .

49 Stat. 1526 (1936), 15 U.S.C. § 13 (1958).

were primarily concerned with protecting the traditional broker-wholesaler-retailer distribution system against the mass distribution retailers.[15] The theory of the Act seems to be that buyers for resale are entitled to equal treatment, *i.e.*, the right to buy at the same price. *FTC v. Morton Salt Co.*[16] reflects the intent of Congress. In that case, the defendant sold its salt to mass retailers at a price less than the price to wholesalers who resold to retailers competing with the favored purchasers. The Act declares unlawful only those price discriminations whose effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The court read this language so as to prevent virtually all discriminatory pricing in customer-injury cases involving purchases for resale. The reasoning of the court was very simple. The opinion states: "the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." It then goes on to conclude, "That respondent's quantity discounts did result in price differentials between competing purchasers sufficient in amount to influence their resale prices of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations 'may be substantially to lessen competition . . . and to injure, destroy, and prevent competition.' "[17]

With the possible exception of *de minimus* price reductions, in cases involving purchases of identical goods for resale, such as *Morton Salt*, the result is one of *per se* illegality.[18]

The Robinson-Patman Act as interpreted by *Morton Salt* has thus effectively closed one avenue of competition among sellers who cannot effectively compete in price on a non-discriminatory basis.

The producer may practice another form of price discrimination which may or may not be foreclosed by the Robinson-Patman Act. We have seen that producers may differentiate their products in order to get more for the product than substantially similar products, or to create barriers to substitute products in obtaining retail distribution. Product differen-

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15 Rowe, Price Discrimination Under the Robinson-Patman Act 3-23 (1962).
16 334 U.S. 37 (1948).
17 Id. at 46-47.
18 There are, however, certain defenses provided by the Act. The most important defenses are that the price discrimination was accounted for by differences in cost of manufacture, sale or delivery, or that the discriminatory price was made in good faith to meet an equally low price of a competitor.

tiation is successful when the cost of differentiation, whether it be by advertising or physical changes, is less than the increase in revenue brought about by the differentiation. But product differentiation need not be aimed solely at business rivals. It frequently is used as a method of discriminating among consumers of the producer's product. Thus a producer may sell a basic appliance for 100 dollars and a "DeLuxe" version of the same appliance for 120 dollars. The physical differences between the two appliances may be trivial, yet many consumers may be willing to pay for the higher priced model. For example, if the "regular" model cost eighty dollars to manufacture and market and the "DeLuxe" model costs eighty-five dollars, the person paying the higher price is the subject of discrimination in the sense that he pays proportionately more for what he gets (if this can be measured by cost of production and marketing).[19]

In a more popular sense, it might be argued that there can be no discrimination if the buyer is given a free choice. If he chooses the higher priced item it must be because it is worth the price. Value of a product after all has meaning only in terms of what price that product will bring on the market. In other words "value" is not a function of cost but of consumer desires as demonstrated by their buying choices. But the concept of "choice" carries with it the idea that the consumer has sufficient knowledge of the alternatives to give meaning to his choice. This argument therefore becomes less forceful as the differentiation becomes more fanciful. Certainly in the most extreme case—when a producer sells the identical product under two brand names at different prices—there is discrimination. Although the buyer has the choice of either product he is deceived by advertising or merely by the price tag into thinking that one product is superior to the other. When the consumer is faced with the choice of products and has lost the ability to judge "quality" he must rely upon advertising or the price of the product to tell him which is better. To the extent that the seller, by advertising or psychological appeals, can manipulate the buyer's desire for the product he can effectively discriminate even though theoretically the buyer is given a free choice.[20]

This kind of discrimination has apparently never been attacked under the antitrust laws. The consuming public is protected under the antitrust laws only indirectly by the function which such laws serve in maintaining a competitive system. Price discrimination is therefore not an antitrust offense if the only victim is the consumer. A seller may deceive his

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19 Kaysen & Turner, Antitrust Policy 179 (1959).

20 For a discussion of advertising techniques in swaying consumer choices, see Packard, The Hidden Persuaders (1957).

customers concerning the value of the goods offered. For example, a department store may sell a garment for five dollars on the first floor and sell an identical garment marked "Slightly Imperfect—Mill Reject" in the basement for four dollars.[21] The first floor buyer is the victim of discrimination by deception. This is essentially what is involved when a manufacturer sells identical goods at different prices under different trademarks. By offering just one product the seller may be able to reach both the cusotmer who will buy "nothing but the best." Whatever may be said for the ethics of this kind of business behavior, it has not been considered an antitrust problem.[22] On the contrary, it can be argued that this kind of deception is beneficial. One of the principal objections to monopoly is that it results in under-production. Normally, more goods can be sold if the price is lowered. A monopolist sells at a price higher than the normal competitive price; therefore, less is sold. If a monopolist can discriminate by dividing his market between people who will buy only at a low price and those who will buy at a higher price, in most cases more will be produced and more people will be served.[23] To the extent that a nationally

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21 For a list of devices for the sale of similar goods at different price levels, see Killough, The Economics of Marketing 277 (1933).

22 Such conduct might be an unfair method of competition or an unfair or deceptive act or practice under § 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45 (1958), although the Federal Trade Commission apparently has never brought any actions on this theory. In two early cases, A. A. Berry Seed. Co., 2 F.T.C. 427 (1920) and St. Louis Lightning Rod Co., 3 F.T.C. 327 (1921), two respondents who were found guilty of other misrepresentations in the sale of their goods were ordered to cease and desist from selling their products under fictitious trade names. It has also been held to be an unfair trade practice to show old films under new titles without disclosure. Fox Film Corp. v. FTC, 296 Fed. 353 (2d Cir. 1924). Relying on the Fox Film case another court upheld an FTC cease and desist order against sales of the same encyclopedia under two different names. Consolidated Book Publishers, Inc. v. FTC, 53 F.2d 942 (7th Cir. 1931). But in American Safety Razor Corp. v. International Safety Razor Corp., 34 F.2d 445 (3d Cir. 1929), it was held to be error to dismiss an action for unfair competition on the grounds of the plaintiff's "unclean hands" where the plaintiff was selling identical razor blades under three different trade marks and at different prices. The court said the plaintiff was within his rights in selling his blades in this manner.

23 Robinson, Economics of Imperfect Competition 203-06 (1933). Mrs. Robinson notes some qualifications to this statement.

> From the point of view of society as a whole it is impossible to say whether price discrimination is desirable or not. It is obviously wasteful, from the point of view of society, if any commodity fails to be produced up to the point where its marginal utility (shown by its demand price) is equal to its marginal cost. But under simple monopoly marginal revenue is equal to marginal cost; monopoly output is therefore undesirably small. From one point of view, therefore, price discrimination must be held to be superior to simple monopoly in all those cases in which it leads to an increase of output, and, as we have seen, these cases are likely to be the more common. But against this advantage must be set the fact that price discrimination leads to a maldistribution of resources as between different uses . . . . Before it is possible to say whether discrimination is desirable or not, it is therefore necessary to weigh up the benefit from the increase in output against this disadvantage.

Id. at 206.

A discriminating monopolist exercises a different degree of monopoly power in his dealings with different customers. Those to whom the price of the discriminating monopolist is lower than it would be if a policy of simple monopoly were pursued, advertised trademark gives substantial monopoly power to the seller of a consumer product, a similar analysis can be applied.

A different problem is involved if the victim of the deception is not just the consumer. Price discrimination is unlawful under the Robinson-Patman Act if the effect of the discrimination is to injure competition on the primary line, *i.e.*, between the seller who engages in price discrimination and his competitors, or on the secondary line, *i.e.*, between customers of the seller who buy at the different prices. Dual distribution may involve both kinds of injury.

If the producer offers his nationally advertised product to all retailers who want to buy, and offers the same product under an unadvertised producer trademark (or for labelling with the buyers' mark) at a lower price to some retailers only, a problem of secondary line injury is involved. The threshold problem under the Robinson-Patman Act is whether the differently branded but physically identical goods are of "like grade and quality." If they are not the Act does not apply.

There may also be injury on the primary line. A seller of goods sold under a highly advertised trademark may face competition from other sellers of similar goods, also marketed under highly advertised trademarks, as well as competition from less favorably advertised products selling at lower prices. The competitive position of sellers of lower priced goods may be seriously altered if the seller of the advertised product also sells in the lower priced market under a different trademark (or for labelling with buyers' marks). This injury may exist whether or not the seller of the advertised product is discriminating among his retailer customers. If no such discrimination exists, we are faced with the additional problem of whether, under the Robinson-Patman Act, dual distribution itself constitutes "discrimination in price." If it does not the Act does not apply.

The two problems will be taken up in turn. First we will consider multiple branding and the concept of "like grade and quality."

In considering this problem, most commentators have made a dichotomy between sales under a highly advertised brand and under an unadvertised or "private" brand owned by the favored retailer. They have recognized that a product sold under an advertised brand is economically different from the same product sold under an unadvertised or private brand.

are benefited by the policy. . . . Those to whom prices are raised will thereby be induced to adopt a consumption pattern which to them is less desirable than if the pricing policy of the industry had been one of simple monopoly. Only in the case where price is lowered to all or at least is not raised to any is there a clear advantage to consumers from discriminating monopoly. Except in those cases where price is either lowered to all or raised to all, some qualitative and quantitative measure is necessary which weighs the injury to the one group against the gain to the other.

Miller, Unfair Competition 167 (1941).

These commentators have differed, however, on the question of how this economic difference should be treated for purposes of the Robinson-Patman Act. The dispute seems to have been carried on primarily in terms of secondary line injury.

The opposing arguments are stated in the Report of the Attorney General's National Committee to Study the Antitrust laws. According to one view:

> [C]ommodities containing precisely identical ingredients but packaged under a distinctive mark or label may not command equal consumer acceptance. Nationally advertised "premium" goods are "competitive" with unknown entities or "economy" brands only at a significant margin in price . . . . [A] price discrimination law can consider heavily advertised and anonymous or private-brand merchandise on an equal legal footing only at a serious distortion of economic facts. Accordingly . . . demonstrable *economic* differences [should] be evaluated under the statutory term "grade" as distinct from any purely physical consideration of "quality."[24]

According to the other view:

> [E]conomic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality" test. . . . [A]bandonment of a physical test of grade and quality in favor of a marketing comparison of intrinsically identical goods might not only enmesh the administrators of the statute in complex economic investigations for every price discrimination charge, but also could encourage easy evasion of the statute through artificial variations in the packaging, advertising or design of goods which the seller wishes to distribute at differential prices. For a determination that the goods are *not* of "like grade and quality" entirely exempts the transaction from all pricing restrictions of the Act. Moreover, a construction of the statutory concept of "like grade and quality" to exclude price differentials in a seller's simultaneous distribution of branded and unbranded goods would, in the opinion of the Committee majority, depart from the plain intent of the statute's draftsmen, who, in 1936, sought to amend the Clayton Act to reach those exorbitant discriminations favoring private brand customers over the seller's regnlar distributors exemplified in the *Goodyear Tire & Rubber* case.
> Rather . . . tangible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible "injury" and "cost justification" provisions of the statute.[25]

In a recent case, *Borden Co. v. FTC*,[26] the Court of Appeals for the Fifth Circuit adopted the first argument and overturned an interpretation of the Act which the Federal Trade Commission has followed for many years.

In that case Borden sold evaporated milk under the Borden trademark and also sold identical milk to certain chain store customers who resold

24 U.S. Att'y Gen., supra note 1, at 158.
25 Id. at 158-59.
26 339 F.2d 133 (5th Cir. 1964).

under their own labels. The price received by Borden for its Borden-brand milk was substantially higher than the amount it received for its private-brand milk. The complaint alleged that this practice was inimical to competition with Borden and with favored customers of Borden. As described by the Commission, producers in the evaporated milk industry fell into three categories: (1) Borden and two other companies, Pet and Carnation, produced evaporated milk which was sold under nationally advertised brand names. (2) Some chain retailing organizations produced evaporated milk which was sold under brands owned by these retailers. (3) Other producers, operating on a regional basis, sold principally to merchandisers who resold under brand names owned by these merchandisers. Borden competed with this latter group for sales to private-label merchandisers.

The complaint alleged both primary and secondary line injury. At the outset the Commission concluded, on the basis of previous Commission decisions, that Borden was selling goods of like grade and quality.

On the question of secondary line injury the Commission found that some purchasers from Borden bought milk at less than the price paid by competing purchasers for Borden-brand milk. Several of the Borden-brand purchasers testified that they wanted private-brand milk and could not get it. The evidence with respect to competitive effects was not extensive. The only evidence of injury was testimony that some potential customers such as institutions that bought primarily on the basis of price were lost to retailers who could not get private-label milk. In finding the requisite competitive injury, the Commission seemed to be relying on the *Morton Salt* formula that equates competitive injury with the fact that some merchants had to pay more for like goods than their competitors.

The Commission also found competitive injury on the primary line. It relied on the following facts: The evaporated milk industry as a whole had suffered a decline in sales and a large number of companies had gone out of business. Borden, by comparison to its private-label competitors, was a large, powerful concern. Private-brand companies were marginal businesses. As a group they had total sales of roughly two-thirds of Borden sales, and the largest in the group had sales roughly one-sixth of Borden sales. Borden expanded its sales of private-label milk and took a substantial amount of sales away from the private-label companies. The private-brand companies were considerably more dependent upon private-label sales than was Borden. The Commission concluded that if price discrimination was continued the elimination or the serious impairment of competition of small competitors in the industry was likely. Although the Commission found injury on the primary line, the evidence showed only that Borden was diverting substantial business from marginal competitors in the private-label field. In effect, private-label suppliers were insulated from price competition from major producers.

In finding that the Act applied, the Commission used a very mechanical test—that of physical similarity. In overturning the Commission the court made an economic appraisal of the two products. It looked to price at the various levels of distribution and concluded that because Borden-brand was sold at a higher price than the same milk under private labels the goods were not of like grade and quality.

Neither the position of the court nor that of the Commission is satisfactory because the problem is more complex than either opinion indicates. The court is on firm ground when it argues that a can of milk packaged with a Borden label and one sold for labelling with the buyer's label are economically different. But its rationalization of this statement is somewhat misleading and masks the problem presented by the case. The court determined that Borden-brand milk and private-brand milk were economically different by looking to "consumer preferences" which resulted in lower retail prices for the private-label milk than for Borden-brand. Retail prices were different in this case but even if they had been the same the problem might not have changed. Retail price is a vital factor when dealing with multiple brands owned by the producer and sold to many retailers so that both brands are readily available to the general public. The producer's promotional efforts will determine in many cases the retail value of the products. It is valid to look to consumer preferences, measured by the price they will pay for the various brands, to see if the products are in fact "different." But the simultaneous sale of a producer branded product and the same product carrying the retailer's brand presents a different problem. Some retailer-owned brands are highly advertised by the retailer and enjoy consumer acceptance comparable to that of the major producer-owned brands.[27] In such cases, on the court's theory, consumer preferences would indicate that the products are the same. But the problem is not changed. The retailer in both situations bought the same thing—unlabelled milk to which he had the producer affix his label. The difference in consumer preferences is, of course, accounted for by the differing promotional activities by the retailer in the two cases. But surely this cannot affect the question of whether the products sold to the retailer were of like grade and quality. The problem is that the product *bought* by the retailer—unlabelled milk to which the producer attaches the retailer's label—is economically different from

27 Weiss, The Coming Battle With The Giant Retailers' Advertised Brands (1959).

the product *sold* by the retailer—milk carrying his label.[28] Thus, the proper inquiry is to determine whether the producer's brand has commercial significance. If it does, the simultaneous sale of the product by the producer with the producer's brand and with the buyer's brand involves the sale of two commercially distinct products.

Retailers testified that they wanted private-label milk and could not get it. This presents the central problem in the case. Some retailers bought both Borden-brand and private-brand and resold them side-by-side on their shelves. The injured retailers could buy only Borden-brand. The injury resulted from a refusal to deal by Borden, but refusals to deal are not unlawful under the Robinson-Patman Act.[29]

If the Robinson-Patman Act had provided that a seller offering goods for sale to distributors had to sell them on the same terms and conditions to all who were willing to buy on such terms and conditions, this dispute over like grade and quality would not exist in secondary line cases. The problem arises because the Act does not forbid discrimination as such, but only a very limited kind of discrimination. A producer may practice complete discrimination against a retailer by refusing to sell to him at all. Or, as in the situation presented by *Borden*, the seller may sell one product to the retailer and refuse to sell him another product of the seller. For example, a producer of typewriters sells his regular machine to all re-

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[28] The economic differences in the two cases discussed in the text need not follow technical ownership of the trademark. For example, a producer could sell a product, bearing an unadvertised trademark owned by the producer, to one retailer and give to him the exclusive right to sell that particular branded product. Although ownership of the trademark is in the producer, the brand in effect is the private brand of the retailer so long as the exclusive arrangement exists. The important question is whether the retailer in his promotional activities can direct his efforts toward a brand identified with him. This is the sense in which the term "private brand" is being used.

[29] Section 2(a) contains a provision "that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." The effect of this provision has been somewhat clouded by the following statement made on the floor of the House of Representatives by Congressman Utterback:

> The bill contains the proviso already contained in the present Clayton Act permitting sellers to select their own customers in bona-fide transactions and not in restraint of trade. This permits, however, the selection of customers and not the selection of what shall be sold to them. It is intended to protect the buyer [sic] against customers who are troublesome in their methods or insecure in their credit. It does not permit the buyer [sic], once he has accepted a customer, to refuse discriminatorily to sell to him particular distinctions of quality, grade, or brand which the seller has set aside for exclusive sale at more favorable prices to selected customers in evasion of the purposes of this bill. Nor does it permit absolute refusal to sell to particular customers where the facts are such as to show that it is done for the purpose of injuring or destroying them and that the elimination of their competition effects a restraint of trade.

80 Cong. Rec. 9418 (1936). It is difficult to reconcile this interpretation with the language of § 2(a) which applies only to "discriminations in price between different purchasers of commodities of like grade and quality." No case has been found in which a refusal to sell the product on any terms has resulted in a violation of § 2(a). A number of cases have held that refusals to deal are not unlawful under the Act. See the discussion in Rowe, supra note 15, at 45-48. Compare the § 2(e) cases cited note 35 infra.

tailers who want to buy. He also sells a demonstrably inferior machine to mass retailers at a price disproportionately lower than the difference in quality. If the lower priced machines are popular with the public, the favored retailers have been given a competitive advantage. But the Act does not apply. However, if the producer sells to the retailer he cannot practice the lesser discrimination of charging a higher price.

A good example of this anomaly is *Atalanta Trading Corp. v. FTC*.[30] That case was brought under Section 2(d) of the Act.[31] Atalanta gave promotional allowances to Giant, a retail chain, in connection with the sale by Giant of picnic hams, canned hams, and Canadian bacon. No sales of such products were made to competitors of Giant at or near the time of the sales to Giant. However, Atalanta was selling other pork products to competitors of Giant at the time the allowances were given. Although the case is not clear on the point, apparently both Giant and its competitors were selling some of the same products of Atalanta in competition with each other.[32] No promotional allowances were granted to Giant's competitors.

The theory of the Commission was that Atalanta's entire line of meat products was one "product or commodity"[33] for the purposes of section 2(d). In the words of the hearing examiner "All of these products were pork, and to the hearing examiner, ham is ham. . . ."[34] Not surprisingly, the court overruled the Commission on this point, holding that the Act did not apply because no competitors of Giant were buying from Atalanta the same product on which the promotional allowances were granted. The

30 258 F.2d 365 (2d Cir. 1958).

31 Section 2(d) is as follows:

That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.

32 Giant bought about $250,000 of Atalanta products in 1954 and $70,000 during the first six months of 1955, the period covered by the complaint. The promotional payments, totalling $3,500, were made with respect to three special promotions of particular products in July 1954, December 1954 and May 1955. Competitors of Giant sold Atalanta's canned products generally. Some allowances, which the Court characterized as price discounts were apparently granted to both Giant and its competitors. It seems, therefore, that some of Atalanta's products were sold by Giant and other retailers in competition with each other.

33 Section 2(d) does not contain the words "like grade and quality." The section in effect forbids discrimination in payments between competitors in the distribution of the same "products or commodities." Rowe, supra note 15, at 392, states that it is uniformly held that the like grade and quality concept is an implicit limitation of the section. This interpretation is expressly supported by the court in Atalanta Trading Corp. v. FTC, 258 F.2d 365, 369-70 (2d Cir. 1958).

34 Atalanta Trading Corp. v. FTC, supra note 33, at 368.

fact that such competitors were selling competing products also supplied by Atalanta was held to be irrelevant. The position of the FTC may be difficult to reconcile with the language of the Act, but it does recognize that in fact Giant was favored. Giant received economic benefits which competitors who also were customers of Atalanta did not receive.[35]

Atalanta thus is quite similar to *Borden*. One supplier sells one product to a group of competing retailers, and also sells another product to some but not to all. By doing so the supplier can confer economic benefits on the favored group which are denied to the unfavored.

The dispute over like grade and quality in the case of branded goods in secondary line cases thus becomes a dispute over whether the transaction is a refusal to deal which is lawful, or a discrimination in price which is unlawful. The argument has been clouded by the fact that the emphasis is usually put on whether the disfavored retailer has been hurt or not. But this can not determine the issue since it is lawful to inflict injury by refusing to sell to him at all.

Instead of searching for a talismanic definition of like grade and quality it seems more sensible to consider the economic effects of treating the goods for Robinson-Patman purposes as like or unlike. Unfortunately a single interpretation of "like grade and quality" may not bring uniformly desirable results in different marketing situations. We will consider the primary line cases and then the secondary line cases.

INJURY TO COMPETITION ON THE PRIMARY LINE

The primary line aspect of the Robinson-Patman Act was carried over from the original Section 2 of the Clayton Act. The purpose of that section was to reach territorial price discrimination, the practice of selling a product for a lower price in some geographical areas than in others.[36] This practice could be used, for example, by a strong national seller

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35 The FTC has attempted to bridge the gap in the Robinson-Patman Act by a novel application of § 2(e). That section provides in effect that it is unlawful for a seller to discriminate among purchasers of the seller's product by furnishing services or facilities in connection with the resale of the product upon terms not accorded to all purchasers on proportionately equal terms. In Luxor, Ltd., 31 F.T.C. 658 (1940), the respondent packaged its perfume in two sizes. The smaller size apparently was easier for retailers to sell than the larger size. It was held to be a violation of § 2(e) to refuse to sell the smaller size to retailers if their competitors were sold that size. In other words, the smaller size was a "service or facility." The same theory was used in General Foods Corp., 52 F.T.C. 798 (1956), in which respondent packaged its coffee in "institutional pack" and "grocery pack" form. Refusal to sell "institutional pack" to some customers was held to violate § 2(e). The theory of these cases would cover the private-label situations. Refusal by a seller to pack his product with a customer's label would violate § 2(e) if other customers were given this "service." Rowe describes the Luxor and General Foods cases as "aberrational." Rowe, supra note 15, at 381.

36 Thumann, "Territorial Discrimination, Robinson-Patman, and a Rule of Reasonable Probability," 8 U.C.L.A.L. Rev. 363, 367-69 (1961).

with a monopoly position, or at least considerable market power, in some markets as a weapon to drive out competitors in a local market.

One of the principal difficulties with using the Robinson-Patman Act in this kind of situation is that the Act speaks of price discrimination and competitive injury in a cause and effect relationship. Unlike the secondary line cases, injury to competition in territorial discrimination cases is not caused by price discrimination. Competitive injury occurs because the discriminating seller is selling at a low price. The injury would be the same whether or not there was discrimination. The only justification for singling out territorial discrimination as an antitrust offense is that a powerful seller who wants to destroy a local competitor may find it more convenient to do so by territorial discrimination. We may take as an example a seller who has a monopoly position in ninety per cent of his markets and is faced with competition in ten per cent, and whose monopoly and competitive markets are geographically divided. He might well reduce his price to a ruinous level in that ten per cent area in order to drive out competitors, but might hesitate to lower his price if he must lower it across the board.[37]

Under the Sherman Act, price competition is not unlawful unless the low price is for the purpose of driving competitors from the market. Here it is necessary to find the narrow line between what is merely hard competition and what is an attempt to monopolize forbidden by Section 2 of that Act. One approach to the problem would be to make illegality depend upon a showing of intent. Is the lower price the result of a predatory purpose or merely vigorous price competition? For example, sales below cost or at an unreasonably low profit over a substantial period of time would be a reasonably reliable indication of predatory intent. But "cost" and "unreasonably low profit" are slippery concepts not always susceptible to adequate proof. Even where they can be proved, such proof might be so time-consuming and expensive as to make enforcement unduly difficult. The Sherman Act approach to the problem therefore involves serious difficulties.

A statute against the practice itself which requires no showing of predatory intent can be justified if a legal test can be devised which differentiates between those cases in which there is a high probability of competitive injury and relatively little public benefit from price competition and those cases in which the opposite is true. There is an obvious difference between the case of the deeply entrenched national seller who sharply cuts prices in the marketing area of a small local competitor, and that of a relatively small seller with a strong position in a local market who

[37] Id. at 378-80.

cuts price in a new marketing area in order to gain sales from established firms already operating there. Any test which is not to get mired in questions of intent or in evaluations of all economic factors in a marketing situation must be arbitrary. There are dangers in any arbitrary rule, but such a rule can be justified if it applies only to situations in which the risk of competitive injury is very great and the countervailing benefit to the public is small. On this basis a finding of illegality seems justified if the territorial price discrimination is carried on for an extended period and is not followed by a lowering of price in the seller's other markets, and if all the following factors are present: (1) the lower price is not defensive in nature or accounted for by cost savings, (2) the discriminating seller has a large share of the higher price market, (3) the lower price market is quite small in comparison to the higher price market, and (4) the lower price is causing substantial reductions in profits of competitors who sell primarily in the lower price market.[38] All of these factors are present in the territorial price discrimination pattern which seems to have been the evil at which the original Section 2 of the Clayton Act was directed.

A seller who wants to practice territorial price discrimination as a predatory weapon may do it by selling his product under one brand at discriminatory prices, or by simply introducing his product, packaged under a "fighting brand," into the area in which he wants to sell at the low price. There are persuasive reasons for using the fighting brand instead of simply lowering the price of his established brand. He can keep the price of the established brand at or near a normal level and still keep some customers with a strong loyalty to that brand. If he had cut price on the established brand these same customers would have been served at a lower price. Moreover, if the established brand has been given the aura of "quality" by advertising, sharp price cuts may have the effect of permanently damaging this image. In any event, when the seller decides to end his price-cutting campaign, it is much more palatable to simply withdraw the fighting brand from the market than to abruptly raise the price of the established brand. Thus, the seller gets whatever advantages territorial price discrimination will bring him while maintaining an outward appearance of being above the price-cutting battle. Where dual distribution by brand is so peculiarly fitted to predatory territorial price discrimination, a reading of "like grade and quality" which would entirely eliminate applicability of the Robinson-Patman Act conflicts with the spirit of the Act.[39]

38 Compare the elements of a proposed statute against price discrimination made by Kaysen & Turner, supra note 19, at 184-85.

39 Rowe states that the use of the fighting brand in conjunction with territorial price

This leads us to consider a comparable but somewhat different use of dual distribution by brand. It was previously pointed out that one seller might be selling two otherwise identical products under different brands without discriminating among retailer customers. In other words, the seller makes the two products generally available to all who want to buy. The question is whether the mere fact of dual distribution violates the Robinson-Patman Act.

This point was involved in *Boss Mfg. Co. v. Payne Glove Co.*,[40] a case which arose under Section 2 of the Clayton Act before it was amended by the Robinson-Patman Act. This was a treble damage action brought by a regional seller of cotton work gloves against a competing national seller of similar gloves. The complaint alleged that the defendant sold its regular gloves at regular prices outside of plaintiff's marketing area and sold a lower grade glove in plaintiff's marketing area at a very low price. The plaintiff was forced to lower the price of its gloves to meet this competition and suffered substantial losses as a result. A jury verdict for the plaintiff was reversed on appeal. The case produced opinions from each of the three judges who heard the appeal.

Two of the judges held for the defendant on the ground that no discrimination was proved because both grades of gloves sold by defendant were offered for sale to all customers of the defendant. One judge also found that the statute did not apply because the lower and higher priced gloves sold by defendant were in fact not of the same grade and quality. The other judges expressed the view that the physical differences between the high and low priced gloves were not sufficient to make them of unlike grade and quality. They seemed to be greatly influenced by expert testimony that the differences in quality were not apparent by observation of the gloves.

The *Boss* case stands for the proposition that there can be no price discrimination if there is no refusal to deal with all customers on the same basis. If this case is good law then a seller of a product under a strong nationally advertised trademark who sold the same product under another brand in order to drive low priced competition from the market would be immune from attack under the Robinson-Patman Act so long as both brands were offered to all buyers.

But the concept of discrimination in primary line cases has been more recently discussed by the Supreme Court in *FTC v. Anheuser-Busch, Inc.*,[41] a territorial price discrimination case. Respondent sold beer in the St. Louis area at a price less than it charged in other parts of the country.

cutting was a notorious predatory tactic prior to adoption of the Robinson-Patman Act. Rowe, supra note 15, at 63.

40 71 F.2d 768 (8th Cir. 1934).

41 363 U.S. 536 (1960).

The lower court had held that price discrimination was more than a difference in price. In its view, "there must be some relationship between the different purchasers which entitles them to comparable treatment."[42] Since all competing purchasers paid the same price there could be no discrimination for the purposes of the Act. This position was flatly rejected by the Supreme Court.

> When this Court has spoken of price discrimination in § 2(a) cases, it has generally assumed that the term was synonomous with price differentiation. In *Federal Trade Comm'n v. Cement Institute* . . . the Court referred to "discrimination in price" as "selling the same kind of goods cheaper to one purchaser than to another."[43]

Whenever a seller engages in dual distribution by selling a commodity under two brands at different prices he is "selling the same kind of goods cheaper to one purchaser than to another." In primary line injury cases it should be immaterial whether there has been discrimination among buyers in the sense of withholding the lower priced product from some. The producer may sell the high and low priced brands to all retailers who want to buy, or, as in *Borden*, he may sell the high priced brand to all who want to buy and reserve the low priced brand for certain mass volume retailers. These two situations are quite different if we are concerned with injury on the secondary line, but, so long as both brands are generally available to all the consuming public, they present the same issue with respect to injury on the primary line.

If, in primary line cases involving territorial price differentials, discrimination in the normal sense of the term is immaterial and the only thing that is required is that the seller sell the same product at different prices, then the rationale of the territorial price discrimination cases should cover differential pricing by dual distribution of advertised and unadvertised brands, whether or not there is discrimination among retailers. At least on the surface, the same kind of arguments applicable to territorial price discrimination apply in brand dual distribution. The underlying theory of the original Section 2 of the Clayton Act seems to have been that sellers with great market power in some markets could use the abnormally high profits gained in those markets to subsidize price cutting campaigns in local markets designed to drive out smaller competitors who could look only to the local market as a source of profit. A national seller with a strong brand is in a similar position. He is in a position to use his strong economic position to finance price cutting campaigns using an unadvertised or fighting brand against smaller competitors who compete only in the private-brand market.

42 Anheuser-Busch, Inc. v. FTC, 265 F.2d 677, 681 (7th Cir. 1959).
43 FTC v. Anheuser-Busch, Inc., supra note 41, at 549.

But there are also significant differences in the two practices. A seller who engages in territorial discrimination can do so at comparatively little cost to himself if the area in which the discrimination is practiced is small. And, the benefit to the public of the price competition is confined to that area. This type of shelter is not present in brand discrimination. Although two "markets" are involved in both cases, the complete separation inherent in geographical discrimination is not present in brand discrimination. If no territorial discrimination is involved the seller who engages in brand discrimination must do so at the cost of providing low price competition to his higher priced product. This factor not only puts severe limits on the use of brand differentiation as a predatory tool, but also results in a positive public benefit. This problem, then, is much more difficult than the problem of territorial discrimination because it is more ambiguous. Dual distribution by brand can be used to put competitive pressure on competitors confined to the lower priced market, but it also can be an avenue for price competition by dominant sellers where such competition might otherwise not exist. Territorial price discrimination is well adapted to predatory purposes; therefore, we are justified in looking at it with suspicion. It is at least doubtful to what extent dual distribution by brand, not involving territorial discrimination, can be used for such purposes. The use of the fighting brand, if it is not to be a weapon of self destruction, might have to be limited to localized areas. This is perhaps an area in which the presumption in favor of unfettered competition should preclude a broad reading of the Robinson-Patman Act.[44]

If price discrimination by brand involves substantially different problems depending upon the presence or absence of territorial price discrimination, then a statute dealing with price discrimination should differentiate the practices. Unfortunately, territorial price discrimination is not specifically dealt with in the Robinson-Patman Act. The failure of the Act to differentiate between kinds of price discriminations raises serious problems of interpretation of the Act in these different contexts. We will defer any attempt at construction of the statutory language until after we have examined some other situations involving the use of dual distribution by brand.

Injury to Competition on the Secondary Line

So far we have looked at the phenomenon of brand dual distribution as a competitive weapon of powerful sellers, either to increase market shares by reaching both high and low-priced markets or to drive out

[44] Compare the admonition of the Supreme Court to reconcile ambiguities in the Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress." Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 74 (1953).

smaller competitors who compete principally in the low-price market. This aspect of the practice gives a misleading picture unless another competitive force, which may be more significant, is also examined.

Increasing dual distribution by producers of nationally advertised branded goods may be defensive in nature rather than aggressive. If the producer is selling identical or substantially similar products in the same markets under different brands owned by him, or is engaging in some other form of artificial differentiation, he is probably doing so in order to reach different segments of the consuming market which react differently to price and advertising. However, if he is selling his product under a nationally advertised brand name and is also selling to distributors who resell under brand names owned by them, he may be reacting to entirely different competitive pressures.

This can be illustrated by a recent Staff Report of the Federal Trade Commission[45] concerning the marketing of frozen fruit, juices, and vegetables. The production segment of this industry in 1959 consisted of 270 packers, of which 228 produced for the retail market; however, a relatively small number of these firms dominated the industry. The four, eight, and twenty largest firms accounted for 39%, 54%, and 71%, respectively, of total retail sales.[46] The report characterized the industry as moderately oligopolistic.[47] But, if the industry is broken down into three sub-industries, retail sales under packer-brands, retail sales under customer-brands, and nonretail sales, concentration ratios change significantly. The packer-brand retail segment is highly concentrated while the non-retail segment shows relatively little concentration.[48] Thus the packer who sells under his own brand operates in the least competitive market. The industry leaders are relatively old and well-established firms which are also engaged in other forms of food processing.[49]

The buyer side of the market also showed substantial concentration. Although the largest percentage of sales, 38%, was made to wholesale distributors who resold primarily to small independent grocers, 24% of all products were sold to the ten largest chains and 12% were sold to other chain stores of eleven or more stores.[50]

If we concentrate on the four largest packers and the ten largest chain stores, an interesting pattern emerges. Sales of the four largest packers in the packer-brand and customer-brand segments of the industry are very different. The four leaders in the packer-brand segment ac-

45 FTC, Economic Inquiry into Food Marketing, Part II, The Frozen Fruit, Juice and Vegetable Industry (1962).
46 Id. at 8.
47 Id. at 36.
48 Id. at 8-9.
49 Id. at 9.
50 Id. at 65-66.

counted for 52% of such sales while the four leaders in the customer-brand segment accounted for only 28% of customer-brand sales.[51] On the buyer's side of the market purchases by the largest buyers showed a reverse concentration. The ten leading chain stores as a group purchased 14% of packer-branded products and 50% of customer-branded products.[52] The largest packers sold primarily under their own brands to small retailers through traditional wholesale channels. The chain store purchases were primarily under customer-brands and were concentrated among the smaller packers. There was an inverse correlation between size of the packer and proportion of total sales made to a few large customers. There was a direct correlation between size of the purchaser and proportion of total purchases made under customer-brands.

The staff report concluded as follows:

> The high sales concentration in the packer-label market in conjunction with the large selling and advertising expenditures necessary to promote such products constitute serious barriers to entrance or survival for new firms in this market. The sales experience of the surviving 67 new firms organized since 1950 confirm this because, although accounting for 25 percent of the survey firms, they accounted for less than 8 percent of total sales and less than 5 percent of packer-label sales.
>
> The characteristics of these new firms indicate that their operations can be classified as "fringe." They generally produced only one or a few minor products rather than large-volume products; they generally were not diversified into related activities; they generally were limited to local markets. The high mortality rate confirms the marginal nature of new firms. New entrants are not likely to alter the main structure of the industry.
>
> The future course of the industry will be affected largely by the growth pattern of the large corporate retail chains which in 1959 marketed a substantial share of the industry's production under their private labels. The large packer-label freezers selling in the national market may face increasingly concentrated retail outlets with the result that their sales of packer-label products are likely to diminish proportionately. The marginal operations of new entrants will provide little countervailing force in the major retail markets. Thus, the asymmetrical marketing pattern of 1959 is likely to become more pronounced.[53]

As graphically illustrated by the frozen food market, the large retailer can be a vital factor in breaking an oligopoly pattern in the producing market which otherwise might not be broken. Firms relying heavily on advertised trademarks to maintain a large percentage of the producing market can be forced into a pattern of dual distribution. As more and more people become accustomed to buying retailer-brands, the effect of producer advertising can be greatly weakened.

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51 Id. at 41.
52 Id. at 66-67.
53 Id. at 6.

Where large retailers account for large percentages of total retail sales in given marketing areas, many producers of advertised brand goods cannot resist the pressure of supplying these retailers with similar goods to be sold under retailer-brands. It appears, therefore, that these producers may be relucant participants in dual distribution. They must supply the retailer who not only is a distributor of the supplier's branded product but also a competitor of that product.

We have here an example of "countervailing power."[54] Strong manufacturers entrenched behind large advertising budgets and established consumer buying patterns are faced only with rivalry among themselves which is not likely to take the form of price competition. So long as retailers are weak there is little threat to this position. The small retailer is wholly dependent on his supplier. No one small retailer is important to the national manufacturer. The manufacturer therefore can deal on his own terms. The trend of recent years to large retail units and concentration has changed this. Many retailing organizations are larger than most of their suppliers.[55] Even retailing units that are not large in absolute terms, such as local retailing chains or cooperatives, may represent substantial shares of local markets. Distribution of food is dominated by large corporate chains and cooperatives selling on a national or regional scale; the individual retail unit has sharply increased in size.[56] The small independent grocer is rapidly becoming a remnant of another day. The same pattern is emerging in the distribution of many other consumer goods. It is this concentration of retailer strength that poses the greatest threat to the position of the consumer goods manufacturer. This is the competitive situation in which the Robinson-Patman Act and the dispute over "like grade and quality" are likely to be most often met. Indeed, almost all of the debate has been made in this context. Both arguments recognize the economic significance of the advertised brand but treat it differently. One would allow the economic differences to entirely exclude application of the Act. The other would recognize economic differences only to the extent such differences bear on the question of competitive injury.

The argument that like grade and quality should include products differentiated only by brand has two bases. First, is the argument that the ordinary English language meaning of the phrase must include phys-

54 See Galbraith, American Capitalism—The Concept of Countervailing Power (rev. ed. 1956).

55 Compare the list of the largest manufacturing firms, Fortune, July 1964, pp. 180-97, with the list of the largest merchandising firms, Fortune, August 1964, p. 158.

56 FTC, Economic Inquiry into Food Marketing, Part I, Concentration and Integration in Retailing 4-7 (1960).

ically identical goods. This argument can be dismissed as an oversimplification which simply ignores economic realities. The second argument presents more difficulties. It states that as a matter of legislative history the framers of the Act specifically intended to reach such products. The *Goodyear Tire & Rubber* case[57] is pointed to as the case which was uppermost in the minds of Congress at the time of passage of the Act.

This case was decided under Section 2 of the Clayton Act just prior to the passage of the Robinson-Patman Act. Goodyear sold tires to Sears, Roebuck & Co. made according to Sears specifications and carrying the Sears' trademark "All State." At the same time it sold Goodyear branded tires at higher prices to retailers who competed with Sears. Goodyear conceded that the differently branded tires were of like grade and quality[58] even though there were in fact some physical differences.[59] The defense of Goodyear was justification based on differing quantities.

Reliance on legislative history in this instance does not seem convincing. First, the legislative history is far from clear on how Congress wanted the issue resolved.[60] Secondly, the *Goodyear* kind of situation may not be a good example of what the Act covers. It seems to be generally conceded that actual physical differences that are "not merely a decorative or fanciful feature" result in goods of unlike grade and quality.[61] If minor func-

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57 Goodyear Tire & Rubber Co., 22 F.T.C. 232 (1936), rev'd, 101 F.2d 620 (6th Cir. 1939).

58 Id. at 290.

59 At least the tread design of the Goodyear tire was different from that of the All State tire. This would appear to be a functional rather than a fanciful differentiation. Indeed, Goodyear's advertising was directed to its "All Weather Non-skid Tread." Testimony indicated that greater public acceptance of the Goodyear tread design than of the Sears tread design allowed Goodyear dealers to sell to the public at higher prices than could Sears. Id. at 311.

60 Rowe reviews the legislative history and concludes as follows:

> The net of the legislative history was this: Rejection of proposals to set up "likeness" in brand or design as an additional statutory prerequisite signified that no blanket exemption was contemplated for "like" products which differed only in brand or design, leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation.

Rowe, supra note 15, at 65. [Italics in original omitted.]

61 U.S. Att'y Gen., Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955); Rowe, supra note 15, at 65-69. This issue has not been well developed in litigation. The scant authority on the question indicates that very slight physical differentiation, even of a functional nature, will not prevent a finding of like grade and quality. Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768 (8th Cir. 1943); General Foods Corp., 52 F.T.C. 798 (1956). In a dictum in Columbia Broadcasting Sys., Inc. v. Amana Refrigeration, Inc., 295 F.2d 375, 378 (7th Cir. 1961), the court stated:

> Although no two programs present the same artistic, educational or entertainment value to all persons it may well be that so-called prime time programs which have demonstrated comparable audience drawing power would be of like grade and quality from a commercial standpoint to prospective sponsor-advertisers.

In spite of the Columbia Broadcasting dictum there seems little likelihood of the adoption of any concept of functional interchangeability to define like grade and quality. It is probable that physical differences will prevent a finding of like grade and quality at least in those cases where the differences in the two products are great enough to cause a substantial proportion of consumers to choose one rather than the other because of the differences. It is not clear to what extent industry designations of grade such as "first tional differences in two products allow the producer to escape the Robinson-Patman Act, then cases such as *Goodyear* need not be repeated. It is often practical physically to differentiate tires, complex tools, or appliances, for example. This differentiation may not be so great as to change the essential similarity of the goods, yet be substantial enough to bypass the Act.

In these cases it is frequently the case that the producer manufactures a product fitting the specifications of the retailer. Obviously, this kind of relationship will exist only with respect to very large retail firms.

Legality of a business practice should not depend upon whether physical differentiation is or is not feasible, if the presence or absence of the physical differentiation is not determinative of value to the consumer. And this will very often be the case with highly advertised branded products. Where physical differentiation of goods is not practical, as is often true with food, alcoholic beverages, paper products, soaps, and drugs, to cite a few examples, the producer is likely to be selling precisely the same product under different trademarks. With less standardized products, the producer can sell slightly different products under different trademarks. Where the differently trademarked products are physically comparable though not precisely the same, and in fact are competitive, the presence or absence of minor physical differentiation is not of great economic significance. A large national retail chain store sells both tires and aspirin tablets under its own brand names. Its suppliers may also be selling producer-branded tires and aspirin to retailers competing with the chain store. If this is so, it is capricious to apply the Robinson-Patman Act in one case and not in the other simply because of physical differentiation.

The requirement of "like grade and quality" is in the Act because it is too difficult to tell whether there is price discrimination and whether injury to competition results if two different products are involved. A distiller sells only scotch whiskey to one retailer at six dollars a bottle, and only gin to a competing retailer at four dollars a bottle. How do we know if there is price discrimination? Must price be based on cost, or relative salability, or what? What of the competitive effects of the price differential? It seems fair to say that the difficulties in measuring competitive effects in this type of transaction would be enormous. Yet, difficulties of comparable magnitude are present in comparing physically similar goods bearing different economically significant trademarks.

One producer with a well-known brand of whiskey may sell to all who

line tire" or "regular gasoline" will lead to a finding of like grade and quality in the face of physical differences. This may have been a factor in the Goodyear case, supra note 57.

want to buy. He also sells the same whiskey for private labelling to Retailer X and Retailer Y at the same price. Retailer X is an effective merchandiser; he advertises his product; he has a good reputation for selling quality products among his customers. Retailer Y is the opposite of Retailer X in all these respects. X may be successful in drawing much business away from retailers selling the producer's well known brand. Y may be unsuccessful in cutting into the market for the producer's well known brand. Yet both bought the same thing from the producer at the same price. We cannot say with any degree of assurance whether, or to what extent, competitive injury was caused by the producer's price differential between his branded and unbranded product. When we recognize that consumer acceptance of the private-label merchandise depends upon the relative effectiveness of promotional efforts of the producer with respect to his brand and efforts of the retailer with respect to his, it is apparent that the price differential to favored and unfavored retailers cannot be isolated as the cause of competitive injury.

To blandly suggest that differences in branding should be accounted for under the cost justification proviso of the Act or under the competitive effects language[62] misleadingly oversimplifies the problem.

The distributor who buys from a supplier is, from the viewpoint of the supplier, performing a service for the supplier. The distributor is the marketing link between supplier and consumer. The supplier's price to a particular distributor must reflect the value of the service that the distributor is performing. The Robinson-Patman mandate that purchasers for resale be treated equally can be defended only if we assume that such purchasers are performing equal services. Whatever can be said for other situations covered by the Act, it is clear that the producer-brand customer and the private-brand customer are not performing comparable economic functions.

The producer of a highly advertised consumer product frequently assumes the major share of the responsibility for selling the product. When it reaches the retailer it has in large part been presold by advertising. The price to the retailer will reflect this. Price must not only compensate the producer for production of the product but also for its promotion. The supplier of private-brand goods takes no part in promoting sale of the product. This function is assumed by the retailer. Again, the price to the retailer must reflect the fact that the supplier is being compensated only for producing the product. There is no reasonable basis for determining

62 See quotation from Report of Attorney General's National Committee to Study Antitrust Laws, reproduced in text to note 25 supra.

the relationship of the two prices, except to say that the prices will be set by competitive forces.

With consumer goods industries in which advertising and promotion determine in large part consumer acceptance of the product, we can expect that the lion's share of the profit will go to the person doing the promoting. Thus, it is not reasonable to expect prices to retailers of highly advertised supplier-branded goods and of buyer-branded goods to be equal or to differ only by differences in promotion costs by the producer.

CONCLUSION

The meaning of "goods of like grade and quality" has never been authoritatively construed by the Supreme Court. The *Borden* case provides it with an opportunity to do so. The validity of the interpretation given by the court in *Borden* varies with the different competitive situations covered by the Act.

It is clear that where the supplier is selling the identical product under brands owned by him, the Act will apply if the brands have no economic significance or if they have substantially the same significance as measured by retail price. We are dealing only with the situation in which the producer has a highly advertised brand which significantly differentiates his products from substantially similar products carrying other brands.

With respect to cases involving private-label merchandise, a persuasive case can be made for excluding application of the Act. Viewed as a secondary-line injury problem, the basic dissimilarity of the functions of the retailer buying private-brand merchandise and that of the retailer buying supplier-branded goods makes any attempt at equal treatment unrealistic. To pretend at the outset that these two classes of retailers are performing similar functions and therefore are entitled to the same price, and then to try to account for inevitable differences in treatment through the cost justification and competitive injury parts of the statute is to misconstrue the situation. Cost justification is not properly applied because differences in cost do not measure the economic value of branded and unbranded consumer goods. Any attempt to find competitive effects of the "price discrimination" is likely to be met with enormous difficulties. But, more important, this practice does not appear to present an illegitimate threat to the small retailer. On the contrary, it tends to maximize competition and consumer choices.

We have had a traditional pattern of retailers competing against each other in the sale of goods bearing the nationally advertised brands of others. In this pattern, primary responsibility for promotion of the product rests with the manufacturer. Promotion is largely done by means of national advertising. Manufacturing and national advertising are thus tied together. Any firm which wants to enter this market as a competitor must make a large investment in what may be a highly risky venture. To the extent that inability to raise capital funds is a serious barrier to entry, competition in the production of such products is likely to be limited to a relatively few firms.

Large retailers selling under strong retailer brands can challenge this position. Such retailers have been able to provide a serious countervailing force to the power of national advertisers particularly in those cases in which they have gained significant shares of consumer markets. But this market power should not necessarily be regarded with suspicion. The power of the retailer is less ominous than that of the national manufacturer. Significant shares of local retailing markets can be obtained by firms that are very small relative to national concerns. Moreover, the cooperative organization under which small retailers band together for joint buying and advertising efforts have shown, particularly in the grocery business, that effective competition can be given to even the giants of retailing.

It is a curious fact that in those areas in which the private brand can be used most effectively by the relatively small retailer or cooperative—low cost, standardized items such as foods, soaps, alcoholic beverages, drugs and the like—the Robinson-Patman Act is likely to be a major problem. In those areas in which only the giant retailer is able to effectively use the private brand—high cost, less standardized items such as complex tools, tires, appliances and the like—the Robinson-Patman Act can be averted by physical differentiation. Thus the Act might be applied where small retailers need less protection, while it can not be applied where they need more protection.

Viewed as a primary line injury problem the private-label cases present some additional problems. The result of decisions such as that of the court in *Borden* is to take away from smaller suppliers who sell primarily in the private-label field the price umbrella they enjoyed under the Federal Trade Commission interpretation of the Act. Sales of private-brand merchandise are increasing with the increase of the size of retailers. Both *Borden* and the Federal Trade Commission frozen food survey discussed earlier, indicate that private-brand suppliers may be relatively small and weak companies. A policy of restricting competition from strong companies such as *Borden* may have the effect of fostering growth of private-brand suppliers in this expanding field. If strong companies such as *Borden* can freely undercut their rivals in the private-brand field there is always the danger that some of the weaker companies may be driven out of business. But we do not have sufficient evidence to know to what extent this is a substantial danger. In the absence of such evidence, we are not justified in assuming that smaller companies cannot compete unless they are afforded protected markets. Although, as we pointed out previously, dual distribution by brand can be used as a predatory weapon against low price competitors, it can be done only at the price of affording substantial price competition to higher priced goods of the person engaging in the practice. Only in territorial discrimination situations does it afford an opportunity for predation without this undesirable backlash.

The phenomenon of dual distribution brought about by private-brand selling can lead to a desirable increase in price competition, but also can pose some threats to small competitors on both the producer and retailer levels. The problem is whether it is better to make a presumption in favor of the Sherman Act policy of open markets and free competition, or in favor of the protective Robinson-Patman Act. On balance, it seems that the public interest in having free access by private-brand retailers to all suppliers should not be lightly sacrificed in order to protect some producers and retailers from a growing competitive force. At least in the absence of an affirmative showing that private-label merchandising has significantly led to the decline of the small business unit, a broad interpretation of the Robinson-Patman Act seems unjustified.

Cases involving multiple producer brands rather than retailer brands present some other considerations. First, we take cases not involving territorial price discrimination. As was previously stated, these cases can be explained as attempts by the producer to reach different markets which react differently to price and advertising appeals. These cases are much more likely to involve a dichotomy between the highly advertised and the unadvertised brand. The retailer who sells the unadvertised brand may not be performing the same function as the seller of private-brand merchandise. In effect he performs much the same function for the producer as the bargain basement performs in the department store. Producers cannot be expected to engage in the practice if sales of the low priced product seriously cut into sales of the high priced product. Thus the self interest of the producer and the retailer selling the advertised product are consistent with each other. This suggests that the secondary line injury problems may not be great. Viewed as a primary line injury problem, the factors considered with respect to private-label sales seem to apply here as well. Again, if producers desire to make lower priced merchandise available to people who are more sensitive to price and less sensitive to advertising, there seems to be no overriding public policy which should prevent them from doing so.

The use of the fighting brand in conjunction with territorial discrimination raises the most troublesome problem. It does not seem permissible as a matter of statutory construction to define "like grade and quality" one way for territorial cases and another way for other cases. Yet the interpretation of the court in *Borden* would take this situation outside the Act also. Here, the spirit of the Act points to a different result. It is necessary, therefore, to make a choice between applying the Act in cases where the overriding objective of maximizing competition and consumer choices will not be served, and not applying the Act in a situation in which it could properly be used. The second alternative seems preferable. First, it is the abnormal situation, whereas other cases of dual distribution are common and can be expected to become more common. Second, there are alternative methods for dealing with the problem. An imaginative use of the Sherman Act or perhaps Section 5 of the Federal Trade Commission Act should be adequate to combat the practice without resort to the Robinson-Patman Act. We are dealing with a predatory practice. Intent might be inferred prima facie from the use of a special brand as the vehicle for territorial discrimination if circumstances indicate that local rivals are the object of the price cut. There would seem to be few cases in which a sustained two-price policy of this kind could be justified by showing business reasons rebutting the inference of predatory intent.